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Book Review: American Indian Water Rights and the Limits of Law by Lloyd Burton

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SPECIAL FEATURES

Book Review: *American Indian Water Rights and the Limits of Law* by Lloyd Burton (University Press of Kansas 1991)

Of all the elements necessary to sustain human existence, water is by far the most crucial. While we often take this precious resource for granted, its importance to all aspects of the human experience is reinforced when its availability is threatened. This notion is illustrated by the abundance of water rights disputes that have arisen in parts of the country that normally possess an excess supply of water and have experienced droughts and atypical weather patterns in recent years.

While disputes over water rights may fluctuate with climactic conditions in certain parts of the country, controversies of this nature are not novel or sporadic in the arid states of the west. This should not come as a surprise, as much of the American Southwest is classified as desert. In addition, rapid population growth in the "Sunbelt" in the latter half of this century has compounded the problem and put a tremendous strain on the water supply in an area that is simply not naturally suited to support the growing population, as well as the growing number of commercial and agricultural entities that now inhibit the Southwest.

The western states are also home to a large number of American Indians, and contain a large number of Indian reservations. Thus, the stage has been set. The attraction is certainly not a premiere of an original script. It is merely a rerun of a portion of American history of the last 250 years. Specifically, it is the evolution of a conflict between Indian and non-Indian interests when non-Indian interests voraciously desire a resource that is possessed by Indian interests.

Due to the abundance of the conflicts described *supra*, and the fact that tremendous amounts of money and the livelihood of entire communities are at stake, attorneys, and laymen alike may find the need to construct a foundation of knowledge in water law as it applies to American Indians.[1] *American Indian Water Rights and the Limits of Law*[2] is an excellent resource for accomplishing this task. Lloyd Burton's book does an excellent job of explaining the legal intricacies of water rights as applied to American Indian interests. In addition, his work is taken to an even higher level by a discussion of the political

1. This statement is particularly true for individuals in the southwestern region of the country.

2. LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW (1991).

and social factors that play mammoth roles in resolving water rights disputes. He also discusses the practicality and enforceability of a decision or agreement once it is finalized. By including these factors, Burton gives the reader a much stronger tactical and analytical base in evaluating a client's, or perhaps his own position in a water rights conflict.

While *American Indian Water Rights and the Limits of Law* contains six chapters, it basically breaks down into four sections.[3] The first of these sections consists of chapters 1 and 2, which provide a social and legal perspective on the evolution of relations between Euro-Americans and American Indians from the time the first Europeans set foot on the North American continent. The historical events and case law described in the first two chapters take one a long way down the path of developing an understanding of how many lawsuits between American Indians and the federal government, state governments, and individual citizens concerning water rights have developed.

One of the most enlightening pieces of this first "section" is the analogy comparing the treaty-making process between the federal government and different Indian tribes in the nineteenth century, which created Indian reservations, and contemporary water rights agreements between Indian tribes and the federal government. History tells us that the result of many treaties which created Indian reservations was a future compromise between a particular tribe and the federal government, where a tribe would acquiesce its paper right to vast amounts of land in exchange for money and the federal government's promise that the tribe would have complete sovereignty over a much smaller amount of land. In addition, these agreements often contained provisions that assured the tribes that they would receive federal assistance in endeavors such as creating stable economies. History also tells us that these promises were often unfulfilled.

The analogy between treaties which created Indian reservations and water rights compacts can be drawn in that to date, some water rights treaties have taken the same path. Specifically, in certain instances, tribes have agreed to give up paper rights in vast amounts of water in return for the federal government's guarantee that a lesser amount of actual "wet water" will be delivered to the tribe. Reflecting the theme of reservation treaties, the water guaranteed often times has not been delivered. Whether this pattern will continue remains to be seen.

Another extremely valuable portion of the first section is Burton's explanation of key case law on the subject of water rights as applied to American Indian interests. One of the most important cases dis-

3. These "sections" are not designated by Burton; they instead represent the way in which the author of this review chose to break down the book for pedagogical purposes.

cussed is *Winters v. United States*.[4] *Winters* established the idea that when the Indians entered into treaties with the United States, they reserved the right to the use of the waters on the reservation, at least to an extent reasonably necessary to irrigate their lands.[5] In addition, for purposes of applying the water law of a particular state, the Indians were to be assigned as an appropriation date the day the treaty became effective (or, due to the fact that Congress unilaterally abolished treaty making in 1871, the date Congress enacted reservation creating legislation).[6]

In determining the outcome in *Winters*, the United States Supreme Court applied a doctrine that was well established to date — the notion that when interpreting a treaty, ambiguities in treaties were generally to be decided in the Indians' favor, due to the inferior bargaining position of the tribes. This notion was established in *Worcester v. Georgia*,[7] where the Court stated that "[t]he language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."[8]

The holding in *Winters* became known as the "*Winters* doctrine", or the "reserved rights doctrine." Its importance is obvious, and cannot be overstated. The reserved rights doctrine grants to Indian tribes an appropriation date that predates the arrival of most settlers to areas where reservations are located. In addition, it sets an unquantified, "reasonable" standard for the amount of water that a tribe may legally use.

An understanding of *Winters* and its progeny is important because it is often the subject of negotiation between a tribe and another entity. Specifically, and again addressing the analogy set forth *supra*, Indian tribes are often asked to give up their reserved right to their potentially vast amounts of water that may, as a practical and technological matter, be difficult to obtain, for a guarantee of the delivery of a smaller amount of water to the reservation.

The second section of *American Indian Water Rights and the Limits of Law* consists solely of chapter 3. It is titled "Issues and Methods in Water Rights Conflicts." The chapter is very beneficial in that it sets forth and explains many of the commonly disputed issues in American Indian water rights litigation. The issues discussed in chapter

4. 207 U.S. 564 (1908).

5. BURTON, *supra* note 2, at 21 (citing PETER C. MAXFIELD ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 207-38 (1977)).

6. *Id.*

7. 31 U.S. (6 Pet.) 515 (1832).

8. BURTON, *supra* note 2, at 21 (quoting *Worcester*, 31 U.S. (6 Pet.) at 582) (M'Lean, J., concurring)).

3 include the following: jurisdiction to adjudicate Indian water rights cases, the quantity of water reserved by the "reserved rights doctrine," what is an appropriate use of the reserved waters, sale of the reserved waters by an Indian tribe to a non-Indian entity outside the reservation's borders, protection of the quality of water which the reservation receives, and who has the authority to represent the Indian interests.

Chapter 3 also contains for the reader's reference a table summarizing the updated results of an extensive survey which was conducted by the Western Network, a regional research institute based in Santa Fe, New Mexico. The survey examined disputes over Indian water rights throughout the western United States. The table includes: (1) the state in which the controversy arose; (2) Indians and other parties to the dispute (including case names the titles of relevant legislative enactments); (3) citations to cases and enactments; (4) primary issues raised in the conflict; and (5) the method(s) of dispute management utilized by the parties. This table is helpful from the standpoint that it allows one to get a feel for the types of issues which are in dispute, where in the country they are occurring, the forum in which they are being resolved, and citation to further explanatory material if desired.

Chapter 3 concludes with a discussion of how, due to the interplay of many political forces, both Indian and non-Indian interests are, in order to settle water rights disputes, becoming more receptive to the concept of negotiating settlements, rather than risking the outcome of formal litigation and the legislative repercussions which may follow. This is certainly good news to the executive branch of the federal government, as the last three presidential administrations have touted negotiation as the best and most efficient means of settling Indian-related water rights disputes. Burton points out that the idea has also intrigued some conservation groups, academic advocates of Indian resource rights and even some tribal litigators (who, as is pointed out in *American Indian Water Rights and the Limits of Law,* appear to be the only ones to have benefitted from the conflict between Indian and non-Indian interests over water rights). The Indians themselves however, while in agreement that negotiation may be the best means of resolving the disputes in question, understandably appear to be slightly more apprehensive about the long range outcome of the negotiation process due to the way in which prior agreements with the federal government have evolved.

Section 3 includes chapters 4 and 5. Due to the flurry of interest in the negotiated settlement of disputes over American Indian water rights as of late, chapter 4 attempts to give the reader a feel for the historical context of negotiated Indian water rights settlements. It accomplishes this task by summarizing and analyzing negotiated Indian water rights settlements that have been finalized from 1910 to the present. The case studies are broken into three distinct eras: (1) agreements nego-

tiated on the tribes' behalf (but in some cases without their consent) in the first half of the twentieth century; (2) waiver and deferral agreements negotiated in the 1960s; and (3) the contemporary settlements which are being negotiated as a result of the trend of the United States Supreme Court to hold against Indian interests, and the current political complexion of Congress, which authorizes the release of federal tax dollars which are necessary to implement these increasingly expensive compacts.

The Ak Chin and Tohono O'Odham Groundwater Settlement Acts of 1978, 1982, and 1984 appear to be excellent agreements for all parties involved because they fairly provide for the marketability of tribal water, enforceability of the compact, and therefore durability of the compact. For these reasons, these agreements may provide the template for future agreements regarding American Indian water rights.

While only time will reveal how successful these agreements are, a more thorough examination of them is certainly warranted, and that is exactly what Burton does in chapter 5. He examines (1) the circumstances which gave rise to the Tohono O'Odham and Ak Chin disputes, (2) the negotiation processes which were utilized in an attempt to resolve them, (3) the substance of the agreements, and (4) some of the problems of implementation which have been encountered.[9]

Section 4 of *American Indian Water Rights and the Limits of Law* consists solely of chapter 6. This chapter proposes policy solutions to some of the problems which have cropped up during the recent onslaught of negotiated settlement of disputes over American Indian water rights. In Burton's view, the most menacing problem which has arisen is the differing degrees of benefit which different tribes have received in their negotiated settlements. While some political commentators feel that this is simply the way the political system works, i.e., some tribes have more power than others, just as some cities and states have more political clout than others, Burton feels that the federal government has a basic moral obligation to provide a fair and just system for negotiating Indian water rights disputes given, among other things, the way previous agreements with Indian tribes have been handled.

The policy recommendations which Burton proposes in chapter 6 are set forth with three basic objectives in mind: "(1) to enhance the fairness of the negotiation process, (2) to ensure that the federal government will keep its promises to the tribes once they are made, and (3) to honor Indian claims substantially without disenfranchising non-Indian claimants who acquired their water interests in good faith."[10] Burton's main tool for accomplishing these objectives would be the

9. BURTON, *supra* note 2, at 87.
10. *Id.* at 129.

establishment of an American Indian Water Rights Commission. Such a commission would perform five major functions, which, taken as a whole, would promote the negotiated settlement of disputes over Indian water rights. These functions are: (1) intergovernmental water-resource planning, (2) acquisition and analysis of data, (3) the drafting and recording of model agreements, (4) the standardization of guidelines and procedures for the negotiation process, and (5) the provision of facilitators and the sponsorship of negotiations.[11]

Chapter 6 also contains two major substantive suggestions which would assist the federal government in honoring a larger portion of allocated water rights. The first suggestion is that the Secretary of the Interior act as a "water banker", buying up available water rights and reallocating them to satisfy the *Winters* rights of the tribes. The second suggestion is the implementation of conservation technology which could save millions of acre feet of water per year. The implementation of either of these suggestions would require a significant amount of money, which Burton suggests be supplied by a limited time five percent service charge on water and power sales in areas where Indian water rights are a subject of controversy. The intricacies of these suggestions are discussed in chapter 6, and provide some food for thought.

Whether or not one agrees with the social, political, and legal positions which Burton states and implies throughout *American Indian Water Rights and the Limits of the Law*, it cannot be disputed that this work is an excellent survey, and provides a good foundation for an understanding of American Indian water rights.

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11. *Id.* at 132.